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## Medicaid Estate Recovery: To Expand, or Not to Expand, That Is the Question

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# Medicaid Estate Recovery: To Expand, or Not to Expand, That Is the Question

Katie L. Summers\*

### Abstract

Medicaid is a program that was created to subsidize the cost of long-term care. To be eligible for Medicaid, individuals must meet strict income and asset limitations. To meet these limitations, a growing number of individuals engage in Medicaid estate planning. To recoup some of the costs of Medicaid, the states are required to implement a Medicaid estate recovery program. There are certain mandated requirements, but the reach of the recovery program is primarily left to the discretion of the states. Pennsylvania recently contemplated expanding its Medicaid estate recovery program, but the proposed changes were not enacted. This Comment provides an overview of Medicaid estate recovery in Pennsylvania by exploring the background of Medicaid, Medicaid estate planning, and Medicaid estate recovery generally. In addition, this Comment examines the arguments for and against Medicaid estate recovery. Finally, this Comment recommends the creation of a system that expands Medicaid estate recovery in Pennsylvania, while retaining certain protections for the deceased Medicaid recipient's heirs.

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## I. INTRODUCTION

Imagine the following scenario: Father 1 lives with his three children. He is not homeless, but many would describe him as being poor. Father 1 becomes ill and must be permanently placed in a nursing home. He applies for Medicaid and is told that his assets are above the threshold, therefore making him ineligible. He is now required to use his own funds and sell his assets to pay for his care until he falls below the threshold. When he reaches this point, Medicaid will assist him in paying for part of his care. However, because of the process he had to go through to reach the threshold, Father 1 no longer has any assets to pass to his children when he dies. At no point throughout this process did Father 1 have enough money to seek the assistance of a lawyer.

Now imagine that at the same time the previously described events are unfolding, Father 2, who also lives with his three children, is experiencing the same situation. Father 2 is also somewhat poor but has more assets at his disposal than Father 1. A few years ago, Father 2 went to a lawyer to receive guidance on how to plan for the possibility of being permanently placed in a nursing home. The lawyer worked with Father 2 to create a plan in which all of Father 2's assets would transfer to his children when he dies without having to go through probate. Father 2 applies for Medicaid at the same time as Father 1, but Father 2 receives funding immediately.

Ironically, although Father 1 arguably had a greater financial need, Father 2 finds himself in a more favorable position. Unlike Father 1, Father 2 does not have to spend his assets to be eligible for Medicaid. Additionally, unlike Father 1, Father 2 is able to pass some of his wealth

to his children. This hypothetical scenario is possible because of the current structure of Medicaid, Medicaid estate planning, and Medicaid estate recovery.

Medicaid started in 1965<sup>1</sup> to help fund the cost of long-term care.<sup>2</sup> It is subsidized by both the states and the federal government<sup>3</sup> and is the single “largest source of funds for institutional long-term care expenses.”<sup>4</sup> Medicaid funds, however, are not available to every individual who is institutionalized.<sup>5</sup> The program is designed to help individuals who are poor and those who, while not necessarily poor, nevertheless lack the personal funds to cover the entire cost of the care they need.<sup>6</sup> To ensure that Medicaid is available for those who need it most, there are strict income and asset limitations that determine who is eligible to receive Medicaid dollars.<sup>7</sup>

Similar to how individuals partake in estate planning to avoid estate taxation, individuals also engage in Medicaid estate planning.<sup>8</sup> Medicaid estate planning is a specific type of planning that involves structuring an individual’s assets in such a way so as to make the individual eligible for Medicaid sooner than the individual would have been without the planning.<sup>9</sup> This process is sometimes referred to as “spending-down” assets.<sup>10</sup>

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1. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 343 (codified as amended at 42 U.S.C. § 1396 (2006)).

2. See DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF ASSISTANT SEC’Y FOR POLICY & EVALUATION, MEDICAID LIENS 1 (2005) [hereinafter MEDICAID LIENS], available at <http://1.usa.gov/hyc4vr>.

3. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF ASSISTANT SEC’Y FOR POLICY & EVALUATION, MEDICAID ESTATE RECOVERY COLLECTIONS 1 (2005) [hereinafter MEDICAID ESTATE RECOVERY COLLECTIONS], available at <http://1.usa.gov/18aNBuC>.

4. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF ASSISTANT SEC’Y FOR POLICY & EVALUATION, MEDICAID ESTATE RECOVERY 1 (2005) [hereinafter MEDICAID ESTATE RECOVERY], available at <http://1.usa.gov/17b5xoV>. In fact, Medicaid “pays nearly half of the total amount spent on nursing homes” every year. *Id.*

5. See *id.*; see *infra* note 26 (defining “permanently institutionalized”).

6. See MEDICAID ESTATE RECOVERY, *supra* note 4, at 1. For example, individuals who do not qualify for welfare because their income is too high, but nevertheless cannot pay for their own health care, account for more than half of all Medicaid spending. MEDICAID LIENS, *supra* note 2, at 1. Specifically, 3.9 percent of all Medicaid recipients are elderly individuals who do not qualify for welfare, but this same group accounts for 25.6 percent of all Medicaid payouts. *Id.*

7. MEDICAID ESTATE RECOVERY, *supra* note 4, at 1; see also *infra* Part II.B (discussing Medicaid estate planning in detail and explaining the restrictions in particular).

8. See generally Sean R. Bleck et al., *Preserving Wealth and Inheritance Through Medicaid Planning for Long-Term Care*, MICH. ST. J. MED. & L. (forthcoming), available at <http://bit.ly/MD8nrW>.

9. See MEDICAID ESTATE RECOVERY, *supra* note 4, at 1.

10. MEDICAID LIENS, *supra* note 2, at 1.

In 1993, the federal government mandated that every state create an estate recovery program to recoup some of the costs of Medicaid.<sup>11</sup> There are certain mandated requirements, but the reach of the program is left to the discretion of the individual states.<sup>12</sup> The main question the states have to answer is from what assets to recover. At a minimum, the states must recover from an individual's probate estate.<sup>13</sup> At a maximum, the states may recover from any assets in which an individual has an ownership interest.<sup>14</sup> In the states where recovery is sought only from the probate estate, Medicaid estate planning can cripple the Medicaid estate recovery program.<sup>15</sup>

The Pennsylvania General Assembly recently contemplated passing a bill that would expand Medicaid estate recovery in the Commonwealth to reach non-probate assets, but the bill never reached the floor for a vote.<sup>16</sup> This Comment will argue that for Medicaid to continue and be able to function equitably, Medicaid estate recovery programs, specifically in Pennsylvania, need to be expanded. Part II will introduce the concepts of Medicaid estate recovery and Medicaid estate planning. Part III will discuss Medicaid estate recovery in Pennsylvania, as well as present the previous proposals to change the program. Part IV will analyze the arguments for and against Medicaid estate recovery and Medicaid estate planning. Finally, Part V will conclude with a proposal to adopt legislation in Pennsylvania that expands Medicaid estate recovery in the Commonwealth, while retaining certain protections for the deceased Medicaid recipient's heirs.

## II. BACKGROUND OF MEDICAID ESTATE RECOVERY AND MEDICAID ESTATE PLANNING

### A. *What Is Medicaid Estate Recovery?*

"Medicaid estate recovery" is the phrase used to describe the process whereby the states seek to recover funds spent on Medicaid

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11. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (codified at 42 U.S.C. § 1396p (2006)) [hereinafter OBRA].

12. See MEDICAID ESTATE RECOVERY, *supra* note 4, at 4.

13. See OBRA, *supra* note 11, § 1396p(b)(4)(A); see also MEDICAID ESTATE RECOVERY, *supra* note 4, at 4.

14. OBRA, *supra* note 11, § 1396p(b)(4)(B); see also MEDICAID ESTATE RECOVERY, *supra* note 4, at 4.

15. See *infra* Part IV (discussing the arguments for and against Medicaid estate planning and Medicaid estate recovery).

16. See *infra* Part III.B (presenting the proposals to amend Medicaid estate recovery in Pennsylvania).

recipients from the recipient's estate when he or she passes away.<sup>17</sup> The goal is to "recover taxpayer dollars invested in Medicaid by requiring more people to use private resources to defray the cost of their own long-term care."<sup>18</sup> The states have been authorized to implement estate recovery programs since 1965 when Medicaid first began.<sup>19</sup> However, prior to 1990, only 12 of the states had established Medicaid estate recovery programs.<sup>20</sup>

The impact of those early Medicaid estate recovery programs did not go unnoticed. One report on the success of such programs concluded that "[e]state recovery programs provide[d] a cost effective way to offset state and Federal costs, while promoting more equitable treatment of Medicaid recipients[.]"<sup>21</sup> For this reason, starting with the Omnibus Budget Reconciliation Act of 1993 ("OBRA"),<sup>22</sup> the federal government made it a requirement for every state to implement an estate recovery program.<sup>23</sup> If a state chooses not to follow the mandate, that state stands to lose federal funding for Medicaid.<sup>24</sup>

### 1. Recoverable Expenses and Recoverable Assets

To comply with OBRA, the states must seek to recover from the estates of certain individuals and from certain assets within those estates. There are two primary groups of Medicaid recipients whose estates are subject to Medicaid estate recovery.<sup>25</sup> The first category includes

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17. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF ASSISTANT SEC'Y FOR POLICY & EVALUATION, MEDICAID TREATMENT OF THE HOME: DETERMINING ELIGIBILITY AND REPAYMENT FOR LONG-TERM CARE 1 (2005) [hereinafter MEDICAID TREATMENT OF THE HOME], available at <http://1.usa.gov/1c2DFpN>.

18. MEDICAID LIENS, *supra* note 2, at 3.

19. See MEDICAID ESTATE RECOVERY, *supra* note 4, at 2. When Medicaid estate recovery was first authorized, the restrictions and limitations on the program were different from those in place today. See *id.*; OBRA, *supra* note 11, § 1396p(b)(1)(B). For example, recoverable estates were limited to estates of those who received Medicaid funds when they were over 65 and "who had no surviving spouse, minor child, or adult disabled child" when they died. MEDICAID ESTATE RECOVERY, *supra* note 4, at 2.

20. MEDICAID ESTATE RECOVERY, *supra* note 4, at 2.

21. *Id.* (internal quotation marks omitted) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HRD-89-56, MEDICAID: RECOVERIES FROM NURSING HOME RESIDENTS' ESTATES COULD OFFSET PROGRAM COSTS 3 (1989)). Specifically, optimism was based on the success of Medicaid estate recovery in Oregon. *Id.* at 3. Medicaid savings were predicted to spike if all the states implemented the Oregon model. *Id.* Unfortunately, this optimistic prediction did not become a reality. See *id.*; see also *infra* Part IV.B (discussing the limited amount of funds actually recovered by Medicaid estate recovery programs).

22. OBRA, *supra* note 11.

23. MEDICAID ESTATE RECOVERY, *supra* note 4, at 2.

24. MEDICAID LIENS, *supra* note 2, at 3.

25. OBRA, *supra* note 11, § 1396p(b)(1)(A)–(B); MEDICAID ESTATE RECOVERY, *supra* note 4, at 3.

Medicaid recipients of any age who are permanently institutionalized in a medical institution.<sup>26</sup> The second category includes only individuals who were age 55 or older when they received Medicaid.<sup>27</sup> For individuals who fall in the second category, recovery must be sought for medical assistance consisting of "nursing facility services, home and community-based services, and related hospital and prescription drug services[.]"<sup>28</sup> However, the states have the power to expand recoverable expenses beyond what OBRA requires to include "any items or services under the State [Medicaid] plan."<sup>29</sup> Consequently, although OBRA creates two broad categories of individuals whose estates are subject to recovery, the states are still granted discretionary power to expand their Medicaid estate recovery program to recover additional expenses.

In addition to determining which estates are subject to Medicaid estate recovery, the states must also determine from which assets within those estates they will seek to recover. Generally, the breadth of the Medicaid estate recovery program is left to the discretion of the individual states.<sup>30</sup> At a minimum, the states must seek recovery from "all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law[.]"<sup>31</sup> In an effort to recover more funds, however, the states are permitted to expand their Medicaid estate recovery programs to reach *any* assets belonging to the deceased Medicaid recipient, whether the assets pass through the probate estate or not.<sup>32</sup> Property that does not pass through the probate estate generally includes assets that pass directly to a

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26. OBRA, *supra* note 11, § 1396p(b)(1)(A). The phrase "permanently institutionalized" means that the individual "cannot reasonably be expected to be discharged from the medical institution and to return home[.]" *Id.* § 1396p(a)(1)(B)(ii). The determination that one is permanently institutionalized is made by the state "after notice and opportunity for a hearing (in accordance with procedures established by the State)[.]" *Id.*

27. *Id.* § 1396p(b)(1)(B).

28. *Id.* § 1396p(b)(1)(B)(i); MEDICAID ESTATE RECOVERY, *supra* note 4, at 3.

29. OBRA, *supra* note 11, § 1396p(b)(1)(B)(ii); *see also* MEDICAID ESTATE RECOVERY, *supra* note 4, at 3. Most of the states have taken advantage of this permitted expansion and have established Medicaid estate recovery programs that seek to recover expenses paid on behalf of an individual beyond those for long-term care and related drug costs. MEDICAID ESTATE RECOVERY, *supra* note 4, at 5.

30. *See* MEDICAID ESTATE RECOVERY, *supra* note 4, at 4.

31. OBRA, *supra* note 11, § 1396p(b)(4)(A); *see also* MEDICAID ESTATE RECOVERY, *supra* note 4, at 4. This Comment refers to this requirement as the "OBRA mandated minimum." Typically, the deceased Medicaid recipient's home is the only valuable asset that is included in the recipient's probate estate. *See* MEDICAID LIENS, *supra* note 2, at 4.

32. OBRA, *supra* note 11, § 1396p(b)(4)(B); *see also* MEDICAID ESTATE RECOVERY, *supra* note 4, at 4.

survivor without having to go through the deceased's will.<sup>33</sup> Examples of non-probate property include joint tenancies with a right of survivorship, life estates, living trusts, annuity remainder payments, and life insurance payouts.<sup>34</sup> Although OBRA authorizes the states to seek recovery from non-probate assets, not all of the states have taken this route.

Studies have sought to determine the division between the states using the OBRA mandated minimum and those that use expanded recovery from all assets, but the results have been inconsistent.<sup>35</sup> Part of the reason why such studies are inconsistent and difficult to perform is because even when a state reports having an estate recovery program that reaches assets beyond the OBRA mandated minimum, it is difficult to determine exactly what assets are included in the broader definition.<sup>36</sup> For example, a 1996 study reported that out of the 40 states interviewed, only 20 had estate recovery programs using the OBRA mandated minimum.<sup>37</sup> However, a 2002 study reported that out of the 48 states interviewed, 30 used the OBRA mandated minimum.<sup>38</sup> Responses regarding the policies in the different states were the same for only half the states.<sup>39</sup> Although seeking to recover from all assets as opposed to just those within the probate estate does not appear to be the policy in the majority of the states, such expansion is still an important consideration for the states when seeking to reduce inequities in the Medicaid and Medicaid estate recovery framework.<sup>40</sup>

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33. OBRA, *supra* note 11, § 1396p(b)(4)(B) (defining non-probate under federal law as "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death"); *see also* MEDICAID LIENS, *supra* note 2, at 7.

34. MEDICAID ESTATE RECOVERY, *supra* note 4, at 4. OBRA also expressly includes "assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." OBRA, *supra* note 11, § 1396p(b)(4)(B).

35. MEDICAID ESTATE RECOVERY, *supra* note 4, at 5.

36. *Id.* The assets included in a decedent's probate estate vary from state to state. Therefore, if a state reports that it seeks to recover from assets outside the probate estate without elaborating, it is difficult to determine not only how the state defines probate but also from which assets outside the probate estate the state seeks to recover without conducting supplemental research.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See infra* Part V (recommending expansion of Pennsylvania's Medicaid estate recovery program to close some of the loopholes that potentially create inequality in Medicaid eligibility).



## 2. Federal Restrictions on Medicaid Estate Recovery

Although OBRA gives discretion to the states to expand the breadth of their Medicaid estate recovery programs, OBRA also prohibits the states from seeking to recover under certain circumstances.<sup>41</sup> There are three general circumstances during which OBRA prohibits the states from recovering from a deceased Medicaid recipient's estate: (1) the lifetime of the Medicaid recipient's surviving spouse; (2) the time during which the Medicaid recipient's surviving child is under 21; and (3) the lifetime of the Medicaid recipient's surviving child who is blind or permanently disabled.<sup>42</sup> In addition, OBRA places two restrictions on the states' ability to recover from the worth of the deceased Medicaid recipient's home.<sup>43</sup>

In reality, however, these restrictions are mere time delays; OBRA permits the states to recover from the deceased Medicaid recipient's estate after the death of the surviving spouse, when the surviving child reaches the age of 21, or when the sibling or adult moves out of the Medicaid recipient's home.<sup>44</sup> Notwithstanding these provisions, a number of the states tend not to recover at all in these delayed circumstances primarily because of the difficulty involved in keeping track of the deceased Medicaid recipient's assets years after the Medicaid recipient passes away.<sup>45</sup>

In addition to the aforementioned restrictions, OBRA also requires the states to incorporate certain waivers and corresponding procedural rules into their estate recovery programs.<sup>46</sup> The only waiver *mandated*

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41. See OBRA, *supra* note 11, § 1396p(b)(2); see also MEDICAID ESTATE RECOVERY, *supra* note 4, at 6.

42. OBRA, *supra* note 11, § 1396p(b)(2)(A); see also MEDICAID ESTATE RECOVERY, *supra* note 4, at 6.

43. OBRA, *supra* note 11, § 1396p(b)(2)(B); see also MEDICAID ESTATE RECOVERY, *supra* note 4, at 6. A state may not recover from the home: (1) when a Medicaid recipient's surviving sibling lived in the recipient's former home for at least one year immediately preceding the institutionalization of the Medicaid recipient and has continued to do so since the date of institutionalization; and (2) when a Medicaid recipient's surviving child lived in the recipient's former home for at least two years immediately preceding the institutionalization of the Medicaid recipient, has continued to live there since, and can prove that he or she provided care to the Medicaid recipient that delayed the recipient's institutionalization. OBRA, *supra* note 11, § 1396p(b)(2)(B); see MEDICAID ESTATE RECOVERY, *supra* note 4, at 6.

44. See MEDICAID ESTATE RECOVERY, *supra* note 4, at 6.

45. See *id.* at 6-7. The amount of Medicaid recovery that is lost when the states choose not to seek delayed recoveries is unknown. *Id.* at 7.

46. *Id.* The procedural safeguards are merely recommendations to the states. *Id.* For example, individuals *should* be informed about the possibility of future Medicaid estate recovery when they initially apply for Medicaid. *Id.* Additionally, the states *should* again inform the recipient of the possibility of Medicaid estate recovery during each annual re-determination process. *Id.*

by OBRA is that the states develop certain procedures under which recovery is waived when recovery would cause undue hardship to the deceased Medicaid recipient's heirs.<sup>47</sup> The states generally have discretion in developing the situations that qualify for a hardship waiver.<sup>48</sup> Beyond specifying the situations that qualify for an exemption, the states must also have procedures in place to notify the surviving family about the initiation of Medicaid estate recovery and give the family an opportunity to claim a hardship waiver.<sup>49</sup>

In addition, the states have the *option* of waiving recovery "when it is not cost-effective[.]"<sup>50</sup> The determination of when recovery is not cost-effective is also left to the discretion of the states.<sup>51</sup> As can be seen, although OBRA places some restrictions on the Medicaid estate recovery programs of the states, the details of the restrictions are discretionary.

### 3. Means of Recovery

One way the states seek to recover Medicaid spending is through the use of liens.<sup>52</sup> A lien is "the right to take someone else's property if an obligation is not discharged."<sup>53</sup> In the context of Medicaid estate recovery, liens are typically used to "protect Medicaid's interest in the recipient's former home and its right to recover Medicaid spending before the property can be conveyed to another party."<sup>54</sup> Liens have become an increasingly more popular tool in Medicaid estate recovery since OBRA was passed in 1993.<sup>55</sup> While the use of liens generally is quite common, the precise manner in which they are used varies from state to state.<sup>56</sup>

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47. OBRA, *supra* note 11, § 1396p(b)(3)(A); *see also* MEDICAID ESTATE RECOVERY, *supra* note 4, at 7, 8.

48. MEDICAID ESTATE RECOVERY, *supra* note 4, at 8. The federal government suggests two circumstances: homesteads of modest value and income-producing property. *Id.*

49. *Id.* at 7.

50. *Id.* at 5. Examples include very small estates and estates where asset ownership is "complicated or legally ambiguous," making recovery itself a costly endeavor. *Id.*

51. *Id.*

52. *See* OBRA, *supra* note 11, § 1396p(a); *see also* MEDICAID ESTATE RECOVERY, *supra* note 4 at 2.

53. MEDICAID LIENS, *supra* note 2, at 4.

54. *Id.* at 2.

55. *Id.*

56. *Id.* Studies attempting to determine the breakdown between the states using pre-death liens and the states using post-death liens have been inconclusive. *Id.* at 10. A combination of three surveys of 46 states revealed that 18 do not use liens at all in Medicaid estate recovery, 18 use pre-death liens, 27 use post-death liens, and 17 use both. *Id.* (citing N.C. LONG-TERM CARE POLICY OFFICE & DIV. OF MED. ASSISTANCE, DEP'T OF HEALTH & HUMAN SERVS., COMPARING STATE MEDICAID RECOVERY EFFORTS (1998); OHIO DEP'T OF HEALTH AND HUMAN SERVS., MEDICAID ESTATE PLANNING AND ESTATE

Specifically, there are two kinds of liens used in Medicaid estate recovery programs: pre-death liens<sup>57</sup> and post-death liens.<sup>58</sup> Regardless of the type of lien a state chooses to use, recovery must be limited to the total value of the estate.<sup>59</sup> Because recovery is limited to the total value of the estate, the deceased Medicaid recipient's heirs are not required to use their own funds to satisfy a Medicaid lien.<sup>60</sup> Furthermore, the placement of a lien on the home does not mean that the Medicaid recipient must sell his or her home.<sup>61</sup> In the event the home is sold, however, a Medicaid lien will prevent the sale from taking place if the home is sold for less than fair market value.<sup>62</sup> Accordingly, liens are a powerful Medicaid estate recovery tool, but they are not without limitation.<sup>63</sup> Moreover, with the rise of Medicaid estate planning,

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RECOVERY IN OHIO (1999); CHARLES P. SABATINO & ERICA WOOD, AARP PUB. POLICY INST., MEDICAID ESTATE RECOVERY: A SURVEY OF STATE PROGRAMS AND PRACTICES (1996)).

57. See OBRA, *supra* note 11, § 1396p(a)(1). Pre-death liens only apply to individuals who are permanently institutionalized. See *id.*; see also MEDICAID LIENS, *supra* note 2, at 5. Pre-death liens prevent Medicaid recipients from transferring assets to family members or other individuals before the asset is used to "offset long-term care expenses paid by Medicaid." MEDICAID LIENS, *supra* note 2, at 5. When the recipient attempts to transfer his or her home, it is presupposed that he or she no longer resides there and has no intention of returning. *Id.* at 6. Therefore, the equity in the home is presumed to be available to cover the cost of the recipient's long-term care. *Id.* Depending on the amount of equity in the home, the recipient may be forced to use these funds to pay for long-term care without the help of Medicaid until the funds are sufficiently "spent-down" and the recipient again falls below the income threshold. See *id.* Similarly, if the recipient's home is transferred as part of the recipient's estate to a non-protected individual, that individual must satisfy the lien in order to receive unencumbered title to the property. *Id.*; see also MEDICAID TREATMENT OF THE HOME, *supra* note 17, at 5-6 (discussing penalty-free transfer of the home to spouses, children, and siblings). In some circumstances, the non-protected heir may be required to sell the inherited property to satisfy the lien. See MEDICAID LIENS, *supra* note 2, at 7; see also MEDICAID TREATMENT OF THE HOME, *supra* note 17, at 5.

58. MEDICAID LIENS, *supra* note 2, at 5. Post-death liens function by tying up settlement of the Medicaid recipient's estate until the state's Medicaid estate recovery claim is discharged. MEDICAID ESTATE RECOVERY, *supra* note 4, at 2. In other words, the deceased Medicaid recipient's assets cannot be passed to his or her heirs until the Medicaid claim is paid. *Id.*

59. See MEDICAID ESTATE RECOVERY, *supra* note 4, at 6.

60. *Id.* There is an exception to this general rule when the deceased Medicaid recipient's home is part of the estate. *Id.* If the home is part of the estate, the heirs may choose to keep the home for personal reasons rather than sell the home to discharge the Medicaid claim, in which case the heirs would need to find other funds, possibly their own, to satisfy the Medicaid estate recovery claim against the estate. *Id.*

61. MEDICAID LIENS, *supra* note 2, at 2.

62. *Id.*

63. See OBRA, *supra* note 11, § 1396p(a)(2); see also MEDICAID TREATMENT OF THE HOME, *supra* note 17, at 8. For example, if the Medicaid recipient's spouse, child under the age of 21, child who is blind or permanently disabled, or sibling resides in the Medicaid recipient's home, the states may not place a pre-death lien on the home. OBRA, *supra* note 11, § 1396p(a)(2); see also MEDICAID LIENS, *supra* note 2, at 6. For

individuals are actively structuring their assets in such a way that the states cannot reach them through the use of liens or any other recovery mechanism.

### *B. What Is Medicaid Estate Planning?*

To be eligible to receive Medicaid funds, individuals must ensure that they meet strict income and asset limitations.<sup>64</sup> Many individuals meet these limitations by “spending-down” their income and assets while at the same time using a substantial portion of any remaining income to fund their own long-term care.<sup>65</sup> This process is commonly referred to as “Medicaid estate planning.”<sup>66</sup> Medicaid estate planning is beneficial not only because it helps individuals become eligible for Medicaid at an earlier time<sup>67</sup> but also because it may “reduce the portion of their estate subject to recovery . . . after their death.”<sup>68</sup> It is important to note, however, that the tools at a Medicaid estate planner’s disposal are not unlimited.<sup>69</sup>

#### 1. Limits on Medicaid Estate Planning

In an attempt to minimize the way assets can be sheltered and to prevent people from purposely impoverishing themselves to be eligible

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the sibling living in the Medicaid recipient’s home to avoid the lien, the sibling must have an equity interest in the home and have resided in the home “for a period of at least one year immediately before the date of the individual’s admission to the medical institution[.]” OBRA, *supra* note 11, § 1396p(a)(2)(C). However, Medicaid may file a claim against the surviving spouse’s estate to attempt to recover the Medicaid funds spent on the deceased Medicaid recipient. MEDICAID LIENS, *supra* note 2, at 9. This tactic includes filing a lien against the home of the deceased Medicaid recipient’s surviving spouse. *Id.* Another pre-death lien limitation requires the states to provide the Medicaid recipient an opportunity for a hearing to lift the lien from the recipient’s home in the event the Medicaid recipient is eligible to leave the long-term care facility where he or she has been residing. OBRA, *supra* note 11, § 1396p(a)(3); MEDICAID LIENS, *supra* note 2, at 6.

64. MEDICAID ESTATE RECOVERY, *supra* note 4, at 1.

65. MEDICAID LIENS, *supra* note 2, at 1. For an overview of Medicaid eligibility and Medicaid estate planning for married couples, see generally DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF ASSISTANT SEC’Y FOR POLICY & EVALUATION, SPOUSES OF MEDICAID LONG-TERM CARE RECIPIENTS (2005) [hereinafter SPOUSES], available at <http://1.usa.gov/1c5JgLQ>.

66. See Bleck et al., *supra* note 8, at 3 (defining Medicaid estate planning as “the process of effectively accessing government resources to pay for long term health care . . . in the manner that is least financially disruptive to the wellbeing of the [sic] person’s spouse and family”).

67. See SPOUSES, *supra* note 65, at 7.

68. MEDICAID ESTATE RECOVERY COLLECTIONS, *supra* note 3, at 6.

69. See OBRA, *supra* note 11, § 1396p(c)(1) (discussing the penalties on certain dispositions of assets).

for Medicaid, OBRA places restrictions on when a Medicaid recipient can dispose of his or her assets.<sup>70</sup> One such restriction is the look-back restriction.<sup>71</sup> This restriction states that “if an institutionalized individual or the spouse of such an individual . . . disposes of assets for less than fair market value on or after the look-back date . . . , the individual is ineligible for medical assistance.”<sup>72</sup> Essentially, when an individual applies for Medicaid, the state agency in charge of the program will check to see if the individual meets the income and asset limitations.<sup>73</sup> In addition to analyzing the applicant’s current income and assets, the agency will also analyze any assets that the applicant owned within the specified look-back period but sold or otherwise disposed of before applying for Medicaid.<sup>74</sup> If such assets were sold or otherwise disposed of for less than fair market value, a penalty will be assessed.<sup>75</sup> As a punishment for such a transfer, the agency will calculate a period of ineligibility during which the applicant is required to use his or her own assets to fund his or her care.<sup>76</sup>

OBRA also contains some exceptions from this asset-disposition restriction.<sup>77</sup> For example, the look-back period restriction does not apply to the transfer of the recipient’s home if the transfer was made to

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70. *See id.* The OBRA restrictions on when assets can be sold, what assets are included, whom the assets can be sold to, and the exceptions from these limitations are highly technical and are not the subject of this Comment. The following examples merely skim the surface to give the reader a basic understanding of how the system works.

71. *See id.*

72. *Id.* § 1396p(c)(1)(A). “Assets” includes “all income and resources of the individual and of the individual’s spouse[.]” *Id.* § 1396p(h)(1). There are very technical requirements regarding what assets are subject to the look-back restriction. *Id.* § 1396p(c)(1)(I), (J). Similar technicalities apply to the disposition of annuities and the effect of such a disposition on one’s eligibility for Medicaid. *See id.* § 1396p(c)(1)(F), (G). These nuances are outside the scope of this Comment.

73. *See* Bleck et al., *supra* note 8, at 5.

74. *See* OBRA, *supra* note 11, § 1396p(c)(1)(A). The look-back period is 60 months. *Id.* § 1396p(c)(1)(B)(i). For an institutionalized individual, the look-back period starts on “the first date as of which the individual both is an institutionalized individual and has applied for medical assistance[.]” *Id.* § 1396p(C)(1)(B)(ii)(I). For a non-institutionalized individual, the look-back period begins on “the date on which the individual applies for medical assistance . . . or, if later, the date on which the individual disposes of assets for less than fair market value.” *Id.* § 1396p(c)(1)(B)(ii)(II).

75. *Id.* § 1396p(C)(1)(A).

76. *See id.* § 1396p(c)(1)(E). For an explanation on how to calculate the amount of time an institutionalized individual may be ineligible for Medicaid assistance after disposing of an asset for less than fair market value during the look-back period, *see id.* § 1396p(c)(1)(E)(i). For an explanation on how to calculate the amount of time a non-institutionalized individual may be ineligible for Medicaid assistance after disposing of an asset for less than fair market value during the look-back period, *see id.* § 1396p(c)(1)(E)(ii).

77. *Id.* § 1396p(c)(2).

any of the protected individuals mentioned in the general restrictions on Medicaid estate recovery.<sup>78</sup> Additionally, there are exceptions for transfers made for the “sole benefit of the individual’s spouse[.]”<sup>79</sup> Another exception is made for transfers solely for the benefit of the recipient’s blind or permanently disabled child.<sup>80</sup> Furthermore, there are broad exceptions for when it can be shown that “the assets were transferred exclusively for a purpose other than to qualify for medical assistance,”<sup>81</sup> and when denial of Medicaid funds would create an undue hardship.<sup>82</sup> Therefore, although the OBRA look-back period restriction seems harsh at first glance, there are exceptions around which future Medicaid recipients can plan.

## 2. Medicaid Estate Planning Tools

It is in the context of the previously discussed look-back period restriction and its exceptions that Medicaid estate planners seek to help individuals spend-down their assets to plan for Medicaid. There are many tools available to Medicaid estate planning practitioners. One such tool is gifting.<sup>83</sup> As long as the gift is given outside the look-back period, there is no limit on the amount an individual can gift and still be eligible for Medicaid.<sup>84</sup> The only caution with gifting is to ensure that the future Medicaid recipient retains enough wealth to care for him or herself until the look-back period expires.<sup>85</sup>

Another tool for Medicaid estate planners is to advise their clients to purchase exempt assets.<sup>86</sup> Exempt assets are those assets that are not

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78. *Id.* § 1396p(b)(2); *see also supra* Part II.A.2 (discussing the circumstances in which recovery is prohibited based on the status of certain protected individuals). The protected individuals include the Medicaid recipient’s: (1) spouse; (2) child under the age of 21; (3) child who is blind or permanently disabled; (4) sibling who “has an equity interest in such home and who was residing in such individual’s home for a period of at least one year immediately before the date the individual becomes an institutionalized individual”; and (5) child “who was residing in such individual’s home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who . . . provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility[.]” OBRA, *supra* note 11, § 1396p(c)(2)(A).

79. OBRA, *supra* note 11, § 1396p(c)(2)(B)(i), (ii).

80. *Id.* § 1396p(c)(2)(B)(iii).

81. *Id.* § 1396p(c)(2)(C)(ii).

82. *Id.* § 1396p(c)(2)(D).

83. Bleck et al., *supra* note 8, at 32–34.

84. *Id.* at 32. This Comment will not discuss the tax implications of gifting or the tax limitations on gifting, although the Medicaid estate practitioner would be concerned with such topics.

85. *Id.*

86. *Id.* at 34. Exempt assets are also known as “exempt resources.” *See id.*

considered when determining eligibility for Medicaid.<sup>87</sup> Examples include remodeling the home, purchasing a new home, purchasing furnishings for a home, purchasing a condominium, paying off debts, and purchasing a new car.<sup>88</sup> Purchasing exempt assets is one way that people can convert assets of value that may prevent them from being eligible for Medicaid into assets of value that will not affect their eligibility.<sup>89</sup>

Although converting assets in this manner may initially help an individual be eligible for Medicaid, there is a potential negative consequence when the individual dies. For example, after the Medicaid recipient dies, the recipient's estate will likely include the newly purchased assets. Depending on the state's Medicaid estate recovery plan, these assets could be subject to recovery.<sup>90</sup>

Yet another Medicaid estate planning option is to spend or consume until asset levels fall below the threshold required to be eligible.<sup>91</sup> For example, vacations, entertainment, cleaning services, or hiring a personal chef are all items that individuals could purchase to "spend-down" their resources.<sup>92</sup>

The aforementioned strategies are only a few of the tools that Medicaid estate planners have at their disposal.<sup>93</sup> The more advanced planning techniques depend on the policies of the individual states.<sup>94</sup>

### III. MEDICAID ESTATE RECOVERY IN PENNSYLVANIA

#### A. *Current Law*

To comply with the federal mandate in OBRA, the Pennsylvania General Assembly enacted Act 49 of 1994,<sup>95</sup> which established Medicaid estate recovery in Pennsylvania. In Pennsylvania, Medicaid estate recovery is run by the Pennsylvania Department of Public Welfare ("the Department").<sup>96</sup>

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87. *Id.* at 9.

88. Bleck et al., *supra* note 8, at 34; *see also* SPOUSES, *supra* note 65, at 8.

89. *See* Bleck et al., *supra* note 8, at 34.

90. *Id.*

91. *Id.*

92. *Id.*

93. For a more detailed and expansive discussion of Medicaid estate planning, *see generally id.*

94. *See* Bleck et al., *supra* note 8, at 3 (explaining that "every state Medicaid program has its unique features and rules" and "specific reference should be made to the appropriate state's laws, cases and regulations").

95. H.B. 1392, 178th Leg., Reg. Sess. § 15 (Pa. 1994), *available at* <http://bit.ly/1fpfAfc> (enacted) (codified at 62 PA. CONS. STAT. § 1412 (2010)).

96. PA. DEP'T OF PUBLIC WELFARE, MEDICAL ASSISTANCE ESTATE RECOVERY PROGRAM AND RELATED TOPICS: QUESTIONS AND ANSWERS 2 (2008) [hereinafter Q&A], *available at* <http://bit.ly/1bdXjRt>.

## 1. Recoverable Expenses and Recoverable Assets

The Department is authorized to seek recovery of “all nursing facility services, home- and community-based services and related hospital and prescription drug services.”<sup>97</sup> In recovering these expenses, however, Pennsylvania has chosen to adopt the OBRA mandated minimum, meaning the Department can only seek to recover from a deceased Medicaid recipient’s *probate* estate.<sup>98</sup> Probate estate property “includes all real and personal property of a decedent which is subject to administration by a decedent’s personal representative.”<sup>99</sup> The statute also provides some specific inclusions and exclusions from the probate estate. For example, joint tenancies with the right of survivorship and tenancies by the entireties are expressly *excluded* from the probate estate,<sup>100</sup> while life insurance proceeds under a policy designating the deceased Medicaid recipient’s estate as the beneficiary are expressly *included*.<sup>101</sup> The designation of property as probate or non-probate is important when considering how to structure assets in a Medicaid estate planning scheme.

Beyond the basic provisions mentioned above, Medicaid estate recovery in Pennsylvania has some unique characteristics. The most distinctive aspect of Medicaid estate recovery in Pennsylvania is the authority given to the Department to expand the reach of the program.<sup>102</sup> The statute expressly provides that the Department, with the approval of the Governor, can expand Medicaid estate recovery to reach “real and personal property in which an individual had *any legal title or interest* at the time of death.”<sup>103</sup> This authority is important because it could serve as a mechanism to expand Medicaid estate recovery not only to recover additional expenses but also to recover from additional assets, including those that are traditionally outside the probate estate.<sup>104</sup> Although this unique aspect of Pennsylvania law makes it seem as though Medicaid estate recovery in Pennsylvania could be expanded to great depths quite easily, such expansion, even if it were to take place, would not be without limitation.

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97. 62 PA. CONS. STAT. § 1412(a) (2010).

98. *Id.*

99. 55 PA. CODE § 258.3(a) (2012).

100. *Id.* § 258.3(b).

101. *Id.* § 258.3(c). Proceeds from life insurance policies payable directly to an individual are not subject to recovery. *Id.*

102. 62 PA. CONS. STAT. § 1412(a).

103. *Id.* (emphasis added).

104. *See id.*



## 2. Hardship Waivers

One such limitation is the hardship waiver. Under Pennsylvania law, as required by OBRA, the Department “will waive its claim in cases of undue hardship.”<sup>105</sup> This restriction serves as a limit on Medicaid estate recovery and would continue to do so even if recovery were expanded beyond the OBRA mandated minimum. Pennsylvania expressly recognizes four hardship waivers, each of which is discussed below.<sup>106</sup> If any of the waivers apply, the Department will permanently waive its claim against the deceased Medicaid recipient’s estate.<sup>107</sup>

Pennsylvania recognizes two hardship waivers relating to the primary residence of the deceased Medicaid recipient.<sup>108</sup> One waiver requires the person requesting the waiver to satisfy three requirements.<sup>109</sup> The requirements pertain to the time period the person requesting the waiver lived in the residence, the availability of alternative residences, and the amount of care the person provided to the deceased Medicaid recipient.<sup>110</sup> The other waiver is for expenses used to maintain the deceased Medicaid recipient’s home while the recipient was receiving care at home or while the recipient was institutionalized.<sup>111</sup>

Additionally, Pennsylvania also allows for a hardship waiver with respect to certain income-producing assets.<sup>112</sup> An “income-producing asset” is defined as “property which is used in a trade or business such as a family farm, family business or rental property.”<sup>113</sup> As with the previously discussed hardship waivers, this waiver also requires that the person claiming the waiver meet certain requirements.<sup>114</sup> One such requirement is that the “asset is used to generate the primary source of income for the household.”<sup>115</sup>

Furthermore, Pennsylvania does not seek recovery from estates of \$2,400 or less if the deceased Medicaid recipient has an heir to inherit the estate.<sup>116</sup> Although the previously mentioned aspects of Medicaid

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105. 55 PA. CODE § 258.10(a).

106. *See id.* §§ 258.10(b)–(c), (e), (f); *see also* Q&A, *supra* note 96, at 8.

107. 55 PA. CODE § 258.10(a).

108. *Id.* § 258.10(b), (e).

109. *Id.* § 258.10(b).

110. *Id.*

111. *Id.* § 258.10(e). The recoverable expenses include “real estate taxes, utility bills, home repairs and home maintenance such as lawn care and snow removal necessary to keep the property in condition for the decedent to return home or to sell at fair market value.” *Id.*

112. 55 PA. CODE § 258.10(c).

113. *Id.* § 258.10(d).

114. *Id.* § 258.10(c).

115. *Id.* § 258.10(c)(1).

116. *Id.* § 258.10(f).

estate recovery in Pennsylvania ensure that the Commonwealth is in compliance with OBRA, they are not without controversy.

*B. Proposed Changes*

In 2009, 2010, and 2011, the Pennsylvania General Assembly introduced legislation that proposed to amend Pennsylvania's Medicaid estate recovery scheme. On April 28, 2009, House Bill 1351<sup>117</sup> ("HB 1351") was introduced. HB 1351 sought to expand the reach of Pennsylvania's Medicaid estate recovery program in two ways.<sup>118</sup> First, HB 1351 proposed to expand the assets from which the Department could recover by removing the word "probate."<sup>119</sup> The proposed language provided that the assets from which the Department could recover would include not only real and personal property typically considered part of the probate estate,<sup>120</sup> but also:

any other real and personal property and other assets in which the deceased individual had any legal title or interest at the time of death, to the extent of such interest, including such assets conveyed to a survivor, heir, or assign, of the deceased individual through joint tenancy, tenancy by the entireties, tenancy in common, survivorship, life estate, living trust or other arrangement.<sup>121</sup>

Second, HB 1351 proposed to expand the expenses for which the Department could seek to recover.<sup>122</sup> Specifically, HB 1351 attempted to authorize the Department to seek recovery of "the amount of medical assistance paid for *all* services provided to the individual."<sup>123</sup> These proposed changes would have likely had far-reaching effects in Pennsylvania, but the bill never made it out of the Health and Human Services Committee for a vote on the House floor before the end of the 2009 legislative session.<sup>124</sup>

Conversely, in 2010, the Pennsylvania General Assembly sought to *limit* the reach of Pennsylvania's Medicaid estate recovery program.

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117. H.B. 1351, 193d Leg., Reg. Sess. § 9 (Pa. 2009), *available at* <http://bit.ly/1dSETG0>.

118. *See id.*

119. *Id.* at 35.

120. *Id.* at 36 ("All real and personal property and other assets subject to inclusion within the deceased individual's estate under 20 Pa.C.S. (relating to decedents, estates and fiduciaries).").

121. *Id.*

122. H.B. 1351, 193d Leg., Reg. Sess. § 9, at 35–36 (Pa. 2009), *available at* <http://bit.ly/1dSETG0>.

123. *Id.* (emphasis added).

124. *Bill Information: Regular Session 2009–2010, House Bill 1351*, PA. GEN. ASSEMBLY, <http://bit.ly/1aw3coC> (last visited Nov. 8, 2013).

House Bill 2252<sup>125</sup> (“HB 2252”) sought to eliminate the language granting the Department, with approval of the Governor, the authority to expand the Medicaid estate recovery program.<sup>126</sup> Similar to HB 1351, HB 2252 was submitted to the Health and Human Services Committee and failed to reach the floor for a vote before the end of the legislative session.<sup>127</sup>

In 2011, the Pennsylvania General Assembly introduced Senate Bill 901<sup>128</sup> (“SB 901”), which proposed to make the same change as HB 2252.<sup>129</sup> The General Assembly submitted SB 901 to the Public Health and Welfare Committee on March 28, 2011,<sup>130</sup> but no further action was taken.<sup>131</sup> As is evident from the failures of the previous proposals, expanding Medicaid estate recovery is not universally supported. Expansion is generally controversial, with strong arguments both for and against.

#### IV. ARGUMENTS FOR AND AGAINST MEDICAID ESTATE RECOVERY AND MEDICAID ESTATE PLANNING

The arguments for and against Medicaid estate recovery and Medicaid estate planning are generally the same. Medicaid estate planning is a tool used to avoid Medicaid estate recovery, while Medicaid estate recovery seeks to recover what Medicaid estate planning attempts to hide.<sup>132</sup> For this reason, it is generally the case that those who support Medicaid estate planning are opposed to Medicaid estate recovery, and vice versa.

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125. H.B. 2252, 194th Leg., Reg. Sess. § 1 (Pa. 2010), *available at* <http://bit.ly/1be5H3n>.

126. *Id.* at 2. Specifically, HB 2252 proposed to remove the following language from 62 PA. CONS. STAT. § 1412(a):

With the approval of the Governor, the department may expand the estate recovery program by regulation to include medical assistance for services other than those listed in this section and to recover against other real and personal property in which an individual had any legal title or interest at the time of death.

*Id.*

127. *Bill Information: Regular Session 2009–2010, House Bill 2252*, PA. GEN. ASSEMBLY, <http://bit.ly/HLAeLA> (last visited Nov. 8, 2013).

128. S.B. 901, 195th Leg., Reg. Sess. § 1 (Pa. 2011), *available at* <http://bit.ly/195JC1X>.

129. *Id.* at 2.

130. *Bill Information: Regular Session 2011–2012, Senate Bill 901*, PA. GEN. ASSEMBLY, <http://bit.ly/19Lk6DM> (last visited Nov. 8, 2013).

131. *Id.*

132. *See supra* Part II.B (discussing Medicaid estate planning).

A. *Medicaid Estate Recovery Promotes the Goal of Medicaid*

The overarching goal of Medicaid is to provide a “safety net” for people who cannot afford to pay for long-term care.<sup>133</sup> A tension emerges because Medicaid can only afford to wrap so many recipients in its safety blanket before the blanket starts to tear. This tension exists because funding for Medicaid, as with all government programs, is limited.<sup>134</sup> Therefore, to achieve Medicaid’s ultimate goal, the scarce funds available must be appropriately and equitably allocated.

Those who support Medicaid estate recovery argue that the program is a tool that helps achieve the goal of Medicaid.<sup>135</sup> It is generally an uncontroversial notion that funds from a program designed to help the poor should be used to help the poor. Nevertheless, a controversy has emerged. Interestingly, the controversy is not about the monetary definition of poor but about the path one takes to get there.

An illustration helps demonstrate the argument. Think back to the scenario in the Introduction to this Comment. Father 1 was poor because his income and assets designated him as such. Father 2, on the other hand, was “poor” because he saw a lawyer who designed a shrewd plan to structure his assets in such a way that he appeared to be poor. Father 2 has assets, or at least *had* assets before implementing the Medicaid estate plan devised by his lawyer, to pay for his own care. Those in favor of Medicaid estate recovery argue that only Father 1 is *actually* poor and, therefore, only Father 1 deserves to receive a portion of the scarce Medicaid resources.

Individuals who oppose Medicaid estate planning believe that this type of planning hinders the ability of Medicaid to function equitably.<sup>136</sup> By design, Medicaid estate planning, like the kind Father 2 engaged in, “results in more people sheltering more assets and increase[s] dependence on th[e] taxpayer-funded program[.]”<sup>137</sup> As more and more people rely on Medicaid to cover the cost of long-term care, the total amount of money available decreases.<sup>138</sup> Medicaid will be hard-pressed to achieve its goal if it continues to help fund long-term care for individuals who have sufficient funds to pay for their own care.<sup>139</sup>

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133. MEDICAID ESTATE RECOVERY, *supra* note 4, at 1.

134. *See id.* at 10 (describing Medicaid as “chronically strapped”).

135. *See id.*

136. *See id.*

137. *Id.* at 11.

138. *See* MEDICAID ESTATE RECOVERY, *supra* note 4, at 11.

139. MEDICAID TREATMENT OF THE HOME, *supra* note 17, at 9 (“Medicaid is chronically strapped for funds and it cannot fully achieve its primary purpose if it subsidizes health care for people who have sufficient means to pay for their own long-term care expenses.”).

Proponents of Medicaid estate recovery argue that Medicaid recipients who are dying and transferring assets to future generations, like Father 2, should have been required to use their available assets to fund their own care rather than be permitted to receive Medicaid dollars. As the law currently stands, however, Medicaid recipients can plan around the income and asset limitations of Medicaid and, in this respect, are *not* required to use their assets to fund their own care. Therefore, Medicaid estate recovery serves as a vehicle to recover assets that arguably should have been used in the first place. Expanding the breadth of Medicaid estate recovery would enable the states to recover more of these assets. In sum, those in favor of Medicaid estate recovery, and opposed to Medicaid estate planning, argue that the program allows Medicaid to pay for the long-term care of those individuals who need it most.<sup>140</sup>

*B. Medicaid Estate Recovery Increases Funding for Medicaid*

Another advantage of Medicaid estate recovery is the money that it recovers. Studies predict that the “states could increase Medicaid recoveries, possibly by substantial amounts, by collecting from assets that individuals could otherwise shelter from recovery.”<sup>141</sup> Proponents of Medicaid estate recovery point out that Medicaid “estate recovery shifts some of the burden of paying for long-term care from the taxpayer to the estates of deceased recipients.”<sup>142</sup> If Medicaid estate planning continues to grow in popularity, however, more Medicaid recipients could be successful in sheltering their assets. As a result, Medicaid, and possibly taxpayers, would be forced to pay a continuously increasing portion of the country’s cost of long-term care with no viable means of recovery.<sup>143</sup> This stress on the system illustrates one reason why proponents favor Medicaid estate recovery: Medicaid recovery reclaims funds that are then available to reinsert into the program.

However, the theory that Medicaid estate recovery increases the funding available for Medicaid is not widely accepted. Initially, Medicaid estate recovery was mandated because of the success of Oregon’s estate recovery program.<sup>144</sup> Studies predicted that if all the states implemented an estate recovery program similar to that used by

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140. See MEDICAID ESTATE RECOVERY, *supra* note 4, at 10.

141. *Id.* at 4. This sheltering behavior results from Medicaid estate planning transferring certain assets “out of the future probate estate into a form outside the State’s Medicaid recovery orbit.” *Id.*

142. *Id.* at 10.

143. See *id.* at 11.

144. See *id.* at 3; see also *supra* Part II.A (discussing the background of Medicaid estate recovery).

Oregon, Medicaid savings would skyrocket.<sup>145</sup> Unfortunately, these predictions did not become reality.<sup>146</sup> For example, in 2003, the states recovered only 0.13 percent of all Medicaid spending through the use of Medicaid estate recovery programs.<sup>147</sup> Additionally, one study of Medicaid estate recovery data concluded that the “connection between a state’s reported collections and the policy options it has chosen” is weak.<sup>148</sup> Opponents of Medicaid estate recovery point to statistics like these to refute the argument that Medicaid estate recovery has any real impact on Medicaid funding.

*C. Medicaid Estate Recovery Interferes With Societal Values*

Another point of contention arising from Medicaid estate recovery is whether the program interferes with the “sanctity of intergenerational legacies.”<sup>149</sup> Part of this sanctity derives from personal and emotional attachment to homes or assets that have been in the family for generations.<sup>150</sup> Some feel that the home is “a right and a legacy that public policy ought to protect.”<sup>151</sup> For opponents of Medicaid estate recovery, inheriting is a right, and Medicaid estate recovery deprives them of this right.<sup>152</sup> Furthermore, opponents view Medicaid estate recovery programs as the state’s way of “stealing inheritances and confiscating people’s homes.”<sup>153</sup> Even worse, some view Medicaid estate recovery of the home as a penalty against those who have worked their entire lives to own a home.<sup>154</sup> Proponents of Medicaid estate recovery, on the other hand, see Medicaid estate recovery as a natural and necessary means to achieve the goal of Medicaid.

*D. Medicaid Estate Recovery Promotes Inequities in the System*

Parties also disagree about the fairness—or lack thereof—of Medicaid estate recovery. Opponents of Medicaid estate recovery believe it is an unfair process.<sup>155</sup> As explained above, Medicaid estate

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145. MEDICAID ESTATE RECOVERY, *supra* note 4, at 3.

146. *Id.*

147. *Id.*

148. MEDICAID ESTATE RECOVERY COLLECTIONS, *supra* note 3, at 4.

149. MEDICAID ESTATE RECOVERY, *supra* note 4, at 10.

150. MEDICAID TREATMENT OF THE HOME, *supra* note 17, at 10.

151. *Id.*

152. *See id.*

153. MEDICAID LIENS, *supra* note 2, at 2.

154. MEDICAID TREATMENT OF THE HOME, *supra* note 17, at 10 (asking whether it is “fair to deprive Medicaid recipients and their survivors of . . . protection simply because a family member was unlucky enough to need help paying for long-term care”).

155. MEDICAID ESTATE RECOVERY, *supra* note 4, at 10.

planning is a popular planning tool through which individuals spend-down their assets to become eligible for Medicaid.<sup>156</sup> However, like most services requiring professional counsel, Medicaid estate planning is an expensive process.<sup>157</sup> Therefore, opponents argue that Medicaid estate recovery reaches only those estates belonging to persons whose income did not permit them to pay for Medicaid estate planning and does not reach the estates of those the program actually targets.<sup>158</sup>

This argument, however, ignores a possible solution. Opponents of Medicaid estate recovery claim that the system is unfair because it recovers only from estates of those who could not afford Medicaid estate planning. But if there were no Medicaid estate planning, there would be fewer inequities because Medicaid estate recovery would recover from the estates of everyone, and presumably more from those who are wealthier. Perhaps the inequity lies not in Medicaid estate recovery but in Medicaid estate planning.

#### V. RECOMMENDATION FOR PENNSYLVANIA: EXPANSION WITH LIMITATIONS

There are firm arguments both for and against Medicaid estate recovery. An additional concern for many Pennsylvanians is likely the financial impact that expanding Medicaid estate recovery would have on the Medicaid recipient's surviving spouse and heirs.<sup>159</sup> Although this is a viable concern, it is still possible to expand Medicaid estate recovery without completely financially devastating the deceased Medicaid recipient's surviving spouse and heirs.

For example, the Pennsylvania General Assembly could expand Medicaid estate recovery to reach all assets, probate and non-probate, but simultaneously create a system similar to the federal estate tax system, wherein it limits the amount of money Medicaid can recover from a deceased Medicaid recipient's estate.<sup>160</sup> To start, the General Assembly could establish a minimum threshold below which the Department could

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156. See *id.* at 1; see also *supra* Part II.B.2 (discussing the tools of Medicaid estate planning).

157. See Bleck et al., *supra* note 8, at 4 (explaining that "Medicaid planning . . . require[s] the assistance of knowledgeable attorneys and others with special expertise in the government benefits field").

158. MEDICAID ESTATE RECOVERY, *supra* note 4, at 10.

159. See generally Letter from Clifford Haines, Pres. Pa. Bar Ass'n, to Governor Edward D. Rendell (June 19, 2009), available at <http://bit.ly/1aJD93n> (outlining the Pennsylvania Bar Association's objections to expanding Medicaid estate recovery).

160. This system would need to be created in such a way that it is not considered a tax in violation of the Pennsylvania Constitution's uniformity of taxation provision. See PA. CONST. art. VIII, § 1.

not seek to recover.<sup>161</sup> The General Assembly could then implement a system of progressive rates that increase as the size of the deceased Medicaid recipient's estate (probate and non-probate) increases. Once the estate surpasses a certain statutorily-imposed ceiling, the Department could recover the remaining portion in full satisfaction of its claim.

For example,<sup>162</sup> suppose a state chooses not to seek recovery from any estates valued below \$3,000. Assume a Medicaid recipient passes away, leaving a combined probate and non-probate estate of \$5,000. Further assume that Medicaid's claim against the estate, based on the services that the state's Medicaid estate recovery plan seeks to recover, is \$5,000. From the figures above, Medicaid could only recover a maximum of \$2,000 because the initial \$3,000 is exempt. For the remaining \$2,000, a progressive system of rates would be applied to determine how much Medicaid can recover. For illustrative purposes, assume the rates are 25 percent for the first \$1,000 and 50 percent for the second \$1,000. In this example, Medicaid would recover \$750 total.<sup>163</sup> The deceased Medicaid recipient's heirs would receive \$4,250.<sup>164</sup>

This proposed solution responds to the above-mentioned advantages and disadvantages of Medicaid estate planning and Medicaid estate recovery. The rates can be used to find an equitable balance between replenishing Medicaid funds and passing wealth to the deceased Medicaid recipient's heirs. It is also important to remember that even in a more expansive system like the one proposed, the previously mentioned hardship waivers would still apply, serving as an added layer of protection for the deceased Medicaid recipient's heirs.<sup>165</sup>

Additionally, by expanding recovery to reach non-probate assets, Medicaid estate recoveries would likely increase, thus raising the amount of funds available to reinsert into the Medicaid system. Furthermore, while this system would not prohibit people from engaging in Medicaid estate planning in order to be eligible for Medicaid earlier, it would

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161. Pennsylvania already has this in place and does not recover from estates valued less than \$2,400. *See supra* Part III.A.2 (discussing hardship waivers in Pennsylvania).

162. This example is for clarification purposes only and uses completely artificial rates and arbitrary figures.

163. The deceased Medicaid recipient's estate was \$5,000, but the first \$3,000 is exempt. Therefore, the estate subject to recovery is \$2,000. The first \$1,000 would be subject to a 25 percent recovery. 1,000 multiplied by 0.25 equals 250. The second \$1,000 would be subject to a 50 percent recovery. 1,000 multiplied by 0.50 equals 500. The sum of these two products would represent Medicaid's total recovery. \$250 plus \$500 equals \$750.

164. The estate was \$5,000, but Medicaid recovered \$750. *See supra* text accompanying note 163 (explaining the calculation). Subtracting the recovered amount from the total estate equals the portion of the estate transferred to the deceased Medicaid recipient's heirs. \$5,000 minus \$750 equals \$4,250.

165. *See supra* Part III.A.2 (discussing hardship waivers in Pennsylvania).



create a more comprehensive mechanism to recoup the taxpayers' dollars that were spent during a time in which the deceased Medicaid recipient could have funded his or her own care. For these reasons, the proposed changes would serve as a step in the right direction in reforming Medicaid estate recovery in Pennsylvania and other states as well.

## VI. CONCLUSION

Medicaid is a program that was developed to help fund the cost of long-term care for those who cannot afford such care on their own. However, the increasing use of Medicaid estate planning is arguably taking the scarce Medicaid resources away from those who need it most—those whom the program was designed to help. By expanding Medicaid estate recovery to reach non-probate assets, the states can increase the amount of money recovered, and, by reinserting the recovered funds into the system, counteract some of the effects of Medicaid estate planning. As this Comment suggests, a progressive rate-based system is an attractive option for state governments seeking to expand Medicaid estate recovery while still maintaining certain safeguards for intergenerational inheritances and the deceased Medicaid recipient's surviving spouse. Therefore, the state governments, especially the Pennsylvania General Assembly, should consider implementing such a system.